

WEBINAR WEDNESDAYS



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DEALING WITH DEFENSE EXPERT WITNESSES

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Goals of Webinar:

- **Outline Basic Rules Relating to Defense Expert Witnesses**
- **Provide a Framework for Dealing with Defense Expert Witnesses**
 - **Pre-Interview Research and Preparation Goals**
 - **Interview Strategies and Methods**
 - **Effective Cross-Examination Tips and Techniques**
 - **Closing Argument Suggestions**
- **Ethics Discussion**
 - **Not Crossing the Line During Cross-Examination**
 - **Staying Within Legal Boundaries During Argument**
- **Defense Expert Witness Preparation Checklist**

Arizona Rules Relating to Expert Witnesses

- **Rule 15.2(c)(2) Arizona Rules of Criminal Procedure**

- For each expert the defendant intends to call at trial:
- (A) the expert's name, address, and qualifications;
- (B) any report prepared by the expert and the results of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and
- (C) if the expert will testify at trial without preparing a written report, a summary of the general subject matter and opinions on which the expert is expected to testify;

Disclosure Considerations

- **When the expert prepares a report**

- Obtain CV
- Consider requesting additional materials in advance of interview if highly specialized expert (Child Abuse, insanity, etc.) in order to question about same during interview
- Determine whether there are Daubert Issues

- **When there is no report...**

- Has there been compliance under Rule 15.2(c)(2)
- Consider requesting something more specific from the Court when necessary
- Lock the witness into a clear and detailed opinion during the pretrial interview

Rule 702 Arizona Rules of Evidence

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- **(b)** the testimony is based on sufficient facts or data;
- **(c)** the testimony is the product of reliable principles and methods; and
- **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Comment to the 2012 Rule

- The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is **reliable** and thus **helpful to the jury's determination of facts at issue**. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. **Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.**
- A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.
- This comment has been derived, in part, from the Committee Notes on Rules--2000 Amendment to Federal Rule of Evidence 702.

Scope of Expert Testimony

- **Proper Subject Matter – Common Knowledge/Will it assist the Jury?**
- Expert testimony is permitted when the subject is beyond the common experience of most persons and the opinion of an expert will assist the trier of fact. Ariz.R.Evid. 702. If the matter, however, is of such common knowledge that persons of ordinary education and background could reach as intelligent a conclusion as an expert, the testimony should be precluded. *State v. Williams*, 132 Ariz. 153 (1982); *State v. Dickey*, 125 Ariz. 163, 608 P.2d 302 (1980); *State v. Mosley*, 119 Ariz. 393, 581 P.2d 238 (1978); *State v. Salazar*, 27 Ariz.App. 620, 557 P.2d 552 (1976). It is within the trial court's discretion to permit expert testimony, and this decision will not be disturbed unless the discretion was abused.

Scope of Expert Testimony

- **Testimony which can assist the jury in assessing credibility of a witness admissible but testimony directly commenting on the credibility of a witness or class of witnesses is inadmissible**
 - ***State v. Ortiz*, 238 Ariz. 329 (2015)**: Rule 702, which governs the admissibility of expert witness testimony, "does not bar 'cold' experts from offering general, educative testimony to help the trier of fact understand evidence or resolve fact issues." (*Salazar—Mercado*, 234 Ariz. 590) "When the facts of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like the reactions of child victims of sexual abuse—expert testimony on the general behavioral characteristics of such victims should be admitted." *State v. Lujan*, 192 Ariz. 448 (1998); *see also State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990) ("[A]n expert witness may testify about the general characteristics and behavior of sex offenders and victims if the information imparted is not likely to be within the knowledge of most lay persons" so long as the expert does not "quantify nor express an opinion about the veracity of a particular witness or type of witness.").

RULE 703 – Bases of Expert Opinion

- An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
 - **Watch for use of expert solely to get in another unavailable expert's opinion**
 - **Watch for use solely to get in Defendant's otherwise inadmissible statement**
 - **Watch for use solely to get in otherwise inadmissible hearsay or other evidence**

RULE 704 – Opinion on Ultimate Issue

- **a) In General--Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
- **(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.
 - An expert may testify to an opinion that "embraces an ultimate issue to be decided by the trier of fact" if the testimony is otherwise admissible. Ariz. R. Evid. 704. The comment to Arizona Rules of Evidence (Rule) 704 cautions, however, that "[w]itnesses are not permitted as experts on how juries should decide cases."
 - Medical Examiner cannot state death was homicide but can state death was consistent with a close range shooting, not consistent with accident or suicide, etc.
 - Law enforcement cannot state defendant was intoxicated but can state defendant exhibited signs and symptoms of intoxication

RULE 705 – Disclosing Facts or Data Underlying Expert's Opinion

- Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Note: However, the Prosecutor can and should request full disclosure of same during pretrial interview

Preparing for Pretrial Interview

- **Know the Expert Witness Before Your Interview**
 - **Conduct thorough internet research relating to the expert**
 - **Research Information contained in CV for accuracy**
 - **Review all sources cited in CV and/or report and check for accuracy**
 - **Contact APAAC and NDAA for information on the expert witness**
 - **Consult Prosecutor's Encyclopedia**
 - **Obtain and review all transcripts of former testimony**
 - **Talk to other prosecutors who have dealt with the witness**
 - **Consult with State's expert prior to interview**

PREPARING FOR PRETRIAL INTERVIEW

- **Assess Credibility, Admissibility and Strength of Opinion**
 - **Is the witness genuinely qualified?**
 - **Does he or she have similar qualifications as State's expert?**
 - **Is all or part of the opinion admissible under the Rules?**
 - **Does the Expert opinion harm the State's case?**
 - **Will the Expert concede major points**

Pretrial Interview with a Report - Strategy

- If the Report is filled with flaws; based on insufficient and/or incorrect facts; relies upon inaccurate data and/or miscites authorities (journal, learned treatises, etc.) determine whether to **correct** or **confirm** content with the witness *prior* to your interview.
 - Many credible experts will correct or change their opinions entirely if provided with additional facts or corrected information.
 - Other experts are not so honorable and may recklessly include facts and data to accommodate the opinion they reach regardless of accuracy or reliability.

Pretrial Interview with a Report

- Confirm CV is accurate and up to date
- Confirm all opinions stated in report
- Confirm list of case documents received/reviewed (if included in report – request same if not)
- Inquire about meetings and or other communication with defense team and/or witnesses and whether additional facts provided
- Confirm all sources considered in preparing report. If citations to literature are not included request list of same during interview.
- Inquire about fee agreement past, present and future
- Obtain list of all prior consults/testimonies

Pretrial Interview Without a Report

Noncredible Expert Witness

- Why no written report?
- Have witness state opinion(s), restate and confirm
- Have witness list all facts they provided - verbally or in writing
- Which facts were relied upon and which were not
- List all documents provided
- List all sources relied upon (literature, learned treatises, etc.) and provide specific citations
- Request witness provide complete list of cases consulted/testified in

Effective Cross-Examination Techniques

- Preparation, preparation, preparation
- Determine in advance whether witness will hurt your case or help it
- If expert can help – let them and move on. If not...
- Is witness testimony identical to prior testimonies (canned presentation)?
- Does witness primarily testify for defense and offer same opinions?
- Does witness personally interview case witnesses?
- Point out facts relied upon which are incorrect

Effective Cross-Examination Techniques

- **Point out facts not considered or ignored**
- **Inquire generally into fee arrangements and specifically into what witness has been and will be paid in the instant case.**
- **Point out inconsistencies or misrepresentations taken from written materials (journals, studies, learned treatises, etc.)**
- **Point out inconsistencies between present testimony and prior testimony given in other cases**
- **If witness testimony based primarily on studies as opposing to hands-on experience, politely and professionally point that out**

Effective Cross-examination Techniques

- If witness opinion is vastly different than majority of literature and scholarly journals in the field, point that out and attempt to get acknowledgement of same from witness
- Inquire whether witness believes all the other folks got it wrong
- Ask for breakdown of how many cases witness consults on and/or provides testimony in per year and approximately how much annual income is derived from same
- Be firm but professional and act in accordance with your duties as a prosecutor at all times

Latitude During Cross-Examination

- **You DO Have Permission to be Thorough and Rigorous:**

It is the further rule that once an expert offers his opinions he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based and which he took into consideration and may be subjected to the most rigid cross-examination concerning his qualifications and his opinion and its sources. *State v. Swafford*, 520 P.2d 1151 (1974).

Closing Argument Suggestions

- **“Expect More”**
 - **An expert’s role is to share specialized knowledge to assist you in understanding things you and I might not otherwise be familiar with**
 - **An expert’s duty is not to advocate – that is the job of the attorney**
 - **An expert is supposed to educate you on matters you may not otherwise be familiar with**
 - **The expert was paid handsomely to complete this task**
 - **The expert should be prepared and professional**
 - **The expert should not readily answer questions of one party but argue with the other**

Closing Argument Suggestions

- **“Bias and Skewed Views”**
 - Same testimony every time regardless of facts
 - More concerned with proving a point than educating and allowing jury how to decide
 - The expert downplayed others’ opinions and research that did not fit with their theory
 - The expert was evasive and at times openly hostile to the prosecutor
 - The expert ignored facts which our common sense tell us should have been considered

Ethical Duties of Prosecutors When Questioning Defense Experts and/or Arguing Reliability

- Because a "prosecutor's interest in a criminal prosecution is not [to] win a case, but [to ensure] that justice [is] done," he must "refrain from improper methods calculated to produce a wrongful conviction just as [he shall] use all proper methods to bring about a just conviction." *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261 (1984)

Ethics Considerations

"The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction." These precepts forbid a prosecutor from making unsupported insinuations or "implying unethical conduct on the part of an expert witness without having evidence to support the accusation." *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (1998)

Ethics Considerations

- "[A] prosecutor cannot attack [an] expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury." 208 Ariz. 232, 92 P.3d 862 (2004)

It is NOT Okay to...

- Infer that a defense expert was paid to fabricate a diagnosis
- Intimate that the expert reached conclusions solely for pecuniary gain
- Infer that a defense expert engaged in other unethical conduct without actual evidence of same
- Refer to defense experts as “mouthpieces” for the Defendant
- Refer to defense experts as “hired guns” for the Defense
- Suggest that mental health experts merely create excuses for criminals
- Suggest collusion between defense counsel and their expert

DEFENSE EXPERT WITNESS CHECKLIST

DISCLOSURE AND PREPARATION

- Does disclosure comply with Rule 15.2(c)(2)?
- Is testimony/opinion admissible under Rule 702?
- Research Expert – Internet, APAAC, NDAA, Prosecutor's Encyclopedia
- Obtain & review all literature cited by/relied upon by expert
- Obtain & review prior interview and trial transcripts
- Speak to prosecutors who have experience with the expert
- Review experts report and opinions with State's expert

Defense Expert Witness Checklist

PRE-INTERVIEW STRATEGY

CREDIBLE EXPERT

- Provide Correct/Additional Facts
- Affirm State's Facts/Theories
- Seek Agreement with State's Expert Opinions
- Keep it Short and Professional

LESS THAN CREDIBLE EXPERT

- Lock into Opinion(s)
- Confirm Inaccurate Facts Relied Upon
- Obtain Additional Impeachment Information

Defense Expert Witness Checklist

PRETRIAL INTERVIEW

- With Report

- Confirm CV is accurate and up to date
- Confirm all opinions stated in report
- Confirm list of case documents received/reviewed (if included in report)
- Inquire about meetings and or other communication with defense team and/or witnesses and whether additional facts provided
- Confirm all sources considered in preparing report. If citations to literature are not included request list of same during interview.
- Inquire about fee agreement past, present and future

- Without Report

- Inquire why witness did not prepare a report
- Have witness state opinion or opinions, restate and confirm
- Have witness relate all facts of the case they were provided verbally or in writing
- Have witness identify which facts relied upon and which were not
- Have witness list all documents reviewed
- Have witness provide citations to all resources relied upon (literature, journals, learned treatises, etc.)
- Confirm witness keeps record of cases consulted and/or testified; Request complete list and ask details of most recent